



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., SW
Washington, DC 20591

JUN 12 2017

Lee Rowland
ACLU
125 Broad Street
New York, NY 10004

Dear Ms. Rowland:

I write in response to your December 16, 2016 letter regarding temporary flight restrictions (TFR) in the vicinity of Cannonball, North Dakota. In that letter, you shared your view that the Federal Aviation Administration (FAA) failed to consult with the Standing Rock Sioux Tribe; initially denied exemption requests from the media; and failed to sufficiently tailor the TFRs, preventing essential media coverage in possible violation of the First Amendment. Thank you for the opportunity to clarify both the facts and the FAA's safety-driven TFR decision-making process.

The FAA is the steward of the National Airspace System, responsible for both providing access to airspace and for ensuring the safety of airspace users and people/property on the ground. At times, conditions on the ground and in the sky require temporarily restricting access to airspace by issuing TFRs in the interest of safety. TFRs can be issued pursuant to 14 C.F.R. §91.137 whenever it is necessary to:

- (a) Protect persons and property on the surface or in the air from a hazard associated with an incident on the surface;
- (b) Provide a safe environment for the operation of disaster relief aircraft; or
- (c) Prevent an unsafe congestion of sightseeing and other aircraft above an incident or event which may generate a high degree of public interest.

Although the conditions giving rise to TFRs are varied, they often arise with little warning and require expeditious FAA action based on available information. When issuing TFRs, the FAA strives to set the least-restrictive, yet effective, flight restriction. To that end, TFRs are purposefully short in duration as this allows for the development and reassessment of facts and restriction parameters. It bears repeating that the Agency's paramount loadstar is safety.

As your letter notes, the FAA issued a series of TFRs in the vicinity of Cannonball, North Dakota from October through December 2016. Protesters congregated in Standing Rock Sioux Tribe lands near Cannon Ball to oppose construction of the Dakota Access Pipeline. North Dakota law enforcement officials contacted the FAA to report that several unmanned aircraft systems (UAS) flying above the protest site approached law enforcement helicopters too closely, risking collision. These incidents, and the potential for future similar events, posed a serious safety risk to both helicopter operators and protesters given that even a small UAS can cause a helicopter crash. For that reason, the FAA issued a 7-mile TFR in the

vicinity of Cannon Ball, North Dakota on October 25, 2016. Within 3 days of issuing the TFR, FAA officials were in contact with attorney Heather Thompson, a representative for the United Tribes of North Dakota and the Rosebud Economic Development Corporation, to answer questions and address tribal concerns related to the TFR.

In response to the tribal concerns presented by Ms. Thompson, and consistent with FAA practice to establish the least restrictive, yet effective TFR, the FAA reduced the size of the next TFR issued on November 4, 2016. The agency not only reduced the TFR from 7 to 4 miles, it also excluded a circular area .6 nautical miles in diameter to allow UAS operations immediately over the protest site. In addition, the FAA made arrangements to allow access to media aircraft by deeming them “participating aircraft” under the TFR regulation. Media merely had to contact the agency as instructed in the Notice to Airmen¹ (NOTAM) to request access and were approved as long as they satisfied all other standard operating and licensing requirements.

On November 7, 2016, the FAA reached out to Dave Archambault II, Chairman of the Standing Rock Sioux Tribe, to explain the TFR changes made in response to the TFR intended to address tribal concerns. Agency officials highlighted changes to the restricted airspace boundaries to allow UAS operations immediately over the protest site. The notice also noted changes allowing media access within the restricted airspace. The FAA continued its tribal outreach through December of 2016, maintaining open lines of communication between the Agency and many tribal parties. The FAA’s outreach culminated in a December 2, 2016 meeting. FAA representatives flew to North Dakota to meet in person with tribal leaders and address remaining TFR concerns. The following tribal parties attended the meeting:

- Dave Archambault II, Standing Rock Sioux Tribe;
- Tree Affiliated Tribes of Mandan, Hidatsa, & Arikara Nation;
- Turtle Mountain Band of Chippewa Indians;
- Spirit Lake Nation;
- Sisseton-Wahpeton Oyate Nation of the Lake Traverse Reservation;
- Rosebud Sioux Tribe;
- Cheyenne River Sioux Tribe; and
- Crow Creek Sioux Tribe.

Tribal leaders asked FAA officials to expand the area carved-out of the TFR for UAS operations. FAA officials explained their safety concerns arising from the many violations of UAS regulations, including night operations, flying over people, unsafe/reckless operations, flying beyond line of sight, and flying within the restricted airspace. Nevertheless, FAA officials agreed to further loosen the TFR restrictions for UAS operators provided a UAS operators fully complied with FAA regulations for a 4-day period.² The

¹ A Notice to Airmen (NOTAM) contains information (not known sufficiently in advance to publicize by other means) concerning the establishment, condition, or change in any component (facility, service, or procedure of, or hazard in the National Airspace System) the timely knowledge of which is essential to personnel concerned with flight operations. The FAA notifies interested parties of TFRs using the NOTAM system.

² From December 6 to December 10, 2016.

FAA's last TFR in the vicinity of Cannonball, North Dakota, expired on December 16, 2016.

As the above information shows, the FAA began an ongoing dialogue with tribal leaders shortly after issuing the TFR over Cannonball in October 2016 and continued until the last TFR expired on December 16, 2016. FAA officials answered questions and responded to tribal concerns. To be clear, at no point did the FAA officials look to abridge anyone's First Amendment rights. Rather, FAA officials followed established protocols to establish the least restrictive, yet effective, restriction that ensured safety in the air and on the ground. Nevertheless, I assure you that the agency will consider your feedback as we continue to improve our TFR processes. If you have any further questions, please contact Lorelei Peter, Assistant Chief Counsel for Regulations, at (202) 267-3073.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. McNall". The signature is written in a cursive, flowing style.

Patricia A. McNall
Acting Chief Counsel